

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

77-4077

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUC AVRIL	)	77-4077
MARIE TELICIA AVRIL	)	
Petitioners	)	PETITION
	)	FOR REVIEW
IMMIGRATION AND	)	
NATURALIZATION SERVICE	)	
Respondent	)	

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUC AVRIL and MARIE TELICIA AVRIL	)	NO. 77-4077
	)	
Petitioners	)	
	)	PETITION FOR JUDICIAL
	)	REVIEW OF ADMINISTRATIVE
	)	<u>AGENCY ACTION</u>
	)	
V.	)	
	)	
	)	
IMMIGRATION AND NATURALIZATION	)	
SERVICE	)	MAY 27, 1977
Respondent	)	

PETITIONERS' BRIEF

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Relevant Statute

Immigration and Nationality Act of 1952, as amended.

Section 244(a), 8 USC 1254(a)

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and --

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * * *

STATEMENT OF THE ISSUES

I DID THE BOARD OF IMMIGRATION APPEALS ABUSE ITS DISCRETION IN SUMMARILY DENYING ALIENS' MOTION TO REOPEN AFTER HAVING RESUBMITTED THE MATTER TO AN IMMIGRATION JUDGE FOR THE EXERCISE OF ADMINISTRATIVE DISCRETION.

II DID THE BOARD OF IMMIGRATION APPEALS ERR BY FAILING TO WEIGH ALIENS' MOTION TO REOPEN IN CONJUNCTION WITH MATERIALS, AFFIDAVIT, AND EVIDENCE PREVIOUSLY SUBMITTED AND BEARING ON ALIENS' APPLICATION FOR SUSPENSION OF DEPORTATION.

STATEMENT OF THE CASE

The matter of Luc and Marie Telicia Avril is before this Court on a Petition For Review of the action of the Immigration and Naturalization Service. The action to be reviewed is the order of October 28, 1976 of the Board of Immigration Appeals, David L. Milhollan, Chairman, which denied aliens' motion to reopen for the purpose of suspension of deportation (R, 2-4, App. 1-2).

The aliens, respondents below, are husband and wife, natives and citizens of Haiti who first entered the United States at Miami, Florida on May 12, 1968 as nonimmigrant visitors for pleasure.

On October 9, 1969 the aliens admitted deportability before Special Inquiry Officer, Henry I. Millman at New York. They then requested the withholding of deportation to Haiti on grounds of political persecution under Section 243(h) of the Immigration and Nationality Act, 8 USC 1253(h). The aliens were found deportable and their application for withholding of deportation was denied (R, 20-25).

In November, 1969, the Avrils began working for Mr. and Mrs. Elmo Roper of West Redding, Connecticut. After Mr. Roper's death the Avrils remained in the employ of Mrs. Dorothy Roper at her home. The Avrils perform all household duties and greatly assist

Mrs. Roper who is ill and frequently confined to home or bed and who has come to depend substantially upon the Avrils. (R, 5-8; App., 7-8)

From 1970 to 1974 Mr. and Mrs. Avril remained in the United States by virtue of three private bills, S 4505, 91st Congress, S 320, 92nd Congress, S 234, 93rd Congress, all introduced by Senator Abraham Ribicoff of Connecticut. On September 26, 1974, the Senate failed to consider favorably the third private bill. The Immigration and Naturalization Service then reinstituted deportation proceedings against these aliens.

The aliens filed, on February 13, 1975, a motion to reopen proceedings (R, 18-19) based on newly discovered evidence relative to the political situation in Haiti. This motion was denied by both the Immigration Judge at Hartford (R, 5-6) and the Board of Immigration Appeals (R, 9-10).

On August 11, 1975, three months after the Avrils acquired seven years in the United States, each filed a Form I-256A, Application for Suspension of Deportation pursuant to 8 USC 1254(a) (R, 5-8; App. 3-8). Each application was treated as a motion to reopen and each was ultimately denied by the Board of Immigration Appeals (R, 2-4; App., 1-2). That denial is now before this Court.

ARGUMENT

I HAVING RESUBMITTED THE PROCEEDING TO AN IMMIGRATION JUDGE FOR THE EXERCISE OF ADMINISTRATIVE DISCRETION, THE BOARD OF IMMIGRATION APPEALS ABUSED ITS DISCRETION AND DENIED DUE PROCESS TO THE ALIENS WHEN IT SUMMARILY DENIED APPLICATIONS WITHOUT HEARING.

On August 11, 1975, pursuant to Section 244(a) of the Immigration and Nationality Act, 8 USC 1254(a), the aliens each filed with the District Director at Hartford, Connecticut, applications for suspension of deportation (R, 5-8, App. 3-8) which were treated as motions to reopen (8 CFR 242.2). The motions and/or administrative file were presumably forwarded from Hartford to Washington for treatment by the Board of Immigration Appeals.¹

Nearly one year after the Avrils filed for suspension of deportation, the Service issued a notice of rescheduled hearing (App. 9, R,) in accordance with the procedure after

1.

8 CFR 103.5 requires that reopening or reconsideration be determined by the officer having made the last decision.

"Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision." 8 CFR 103.5

reopening of proceedings. 8 CFR 3.2, 3.8, and 242.1, et seq, Gordon & Rosenfield, Immigration Law and Procedure, Section 5.13(a). On July 29, 1976, the Service issued a superseding notice of rescheduled hearing (App. 10, R,) This subsequent notice set a hearing for September 15, 1976.

Shortly before the hearing scheduled for September 15, 1976, counsel for the aliens, for good cause shown, requested a postponement of the District Office and was advised, presumably pursuant to 8 CFR 242.13, that only the Immigration Judge could entertain such a request. Counsel for the aliens so requested (App. 11, R,).

Although the aliens requested a continuance for good cause, apparently none was granted, for the only Service response to aliens' request was the decision of the Board of Immigration Appeals which is the subject of review here.

It is clear that aliens in proceedings before the Service have the right to counsel, 8 USC 1252(b), 1362; 8 CFR 242.10, 242.16, 292.5(b); Murgia-Melendrez v. INS, 407 F.2d 207 (9th Cir. 1969). Also, continuances will be given when aliens so request in order to obtain counsel. 8 CFR 242.13. To request an adjournment for counsel to be present is not unreasonable. The case of counsel requesting a continuance for good cause is substantially different from

those cases in which counsel failed to appear. Weinbrand v. Prentis, 4 F.2d 778 (6th Cir. 1925), U.S. V. Heikkinen, 240 F.2d 94 (7th Cir. 1951), rev'd on other grounds, 355 U.S. 273.

Rather, the situation here is one in which the Service unreasonably refused a request for continuance, thereby substantially depriving aliens of their right to counsel and due process. Chlomos v. U.S. Dept. of Justice, 516 F.2d 311 (3rd Cir. 1975); Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975).

Although no party has an inflexible right to an adjournment, Gordon and Rosenfield, Immigration Law and Procedure, Section 5.81; Olivera v Immigration and Naturalization Service, 504 F.2d 1372 (5th Cir., 1974), upon adequate cause an alien is entitled to a reasonable continuance, especially when the request is grounded in the fundamental right to counsel.

The Service, having taken a year to reopen and reschedule a hearing in this matter would not have been prejudiced by an additional continuance of six (6) weeks as was requested. Instead, without notice of what action was taken on the scheduled hearing date, the Service denied the aliens' motion on its original papers.

Although the Board of Immigration Appeals may summarily

deny motions or appeals, it cannot do so after the threshold question has been reached and a hearing has been scheduled at which administrative discretion is to be exercised. Once the aliens have established by their motion papers sufficient evidence to trigger a rehearing before an Immigration Judge, then not to hold such a hearing is to not exercise the discretion necessary to properly adjudicate the proceedings.

That is, the purpose of the hearing is to allow the Immigration Judge to exercise the discretionary powers vested in him after a prima facie showing of eligibility has been made. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957); Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), cert. denied, 365 U.S. 860 (1960). The provision of the Immigration and Nationality Act, 244(a), 8 USC 1254(a), under which the Avrils applied requires that that discretion be exercised. Asimakopoulos v. Immigration and Naturalization Service, 445 F.2d 1362 (9th Cir. 1971); Chan v Rosenberg, 445 F.2d 1399 (9th Cir. 1971); Matter of Riccio, 15 IN__ (I.D. 2463, 1976). Here, the Service scheduled a hearing for just that purpose. However, when a continuance was reasonably requested, the Service abused its discretion, or did not exercise it at all, when it summarily denied the aliens' application.

II THE BOARD OF IMMIGRATION APPEALS ABUSED ITS DISCRETION
WHEN IT DENIED ALIENS' MOTION TO REOPEN IN THAT IT FAILED
TO CONSIDER PREVIOUSLY SUBMITTED EVIDENCE IN CONJUNCTION
WITH ALIENS' REQUEST FOR SUSPENSION OF DEPORTATION.

The thrust of the Avrils prior motion to reopen under Section 243(h) of the Immigration and Nationality Act, 8 USC 1253(h), was the changed political situation in Haiti (R, 18-19). To support their position of political persecution, the aliens submitted substantial materials with their motion (R, 28, 29, 30-32, 33-35). These included personal accounts of atrocities to friends and relatives and media accounts of the economic and political situation in Haiti. The Immigration Judge found that the evidence did not relate directly to political persecution of the Avrils.

However, upon the Avrils later motion to reopen, based on Section 244(a) of the Act, 8 USC 1254(a), the Board of Immigration Appeals failed to consider those materials and affidavit previously submitted in the light of the aliens' new status of having been physically present in the United States for seven (7) years.

The aliens have not submitted any evidence in support of their applications. The mere showing that the respondents have achieved the minimum statutory period of continuous physical presence does not ordinarily, without more, establish the statutory prerequisite sufficient to warrant reopening for a plenary hearing.

(R., 3; App., 2)

Shortly after the Avrils achieved seven-year status and became eligible for 244(a) relief, they filed the appropriate forms. These forms were filed only six (6) months after the Avrils applied for withholding of deportation under Section 243(h). The Board erroneously viewed the latter motion without considering it in conjunction with materials and affidavit already on file.

It is the aliens' contention that they will suffer economic hardship if returned to Haiti. This, in itself, is admittedly not enough. Cheung v. Immigration and Naturalization Service, 422 F.2d 686 (3rd Cir. 1970), Pelaez v. Immigration and Naturalization Service, 513 F.2d 303 (1975), cert. denied. 423 U.S. 892. However, economic hardship, coupled with their strong claim of a denial of human rights if deported to Haiti should have been sufficient to warrant a reopening of proceedings under 8 USC 1254(a) for a further exercise of administrative discretion.

The Board should have viewed the Avrils' motion to reopen and suspend deportation in light of the materials, affidavit, and evidence previously adduced and bearing on aliens' instant motion. Had it done so, the Board would have reopened the proceeding and resubmitted the entire matter to the Immigration Judge for a hearing and determination of whether or not discretion should be exercised in a manner favorable to the Avrils.

CONCLUSION

For the foregoing reasons the decision of the Board of Immigration Appeals should be reversed and the Board should be ordered to suspend the deportation of the Avrils. In the alternative, the decision of the Board of Immigration Appeals should be reversed, this matter should be remanded, and the Service should be ordered to exercise administrative discretion.

Respectfully submitted,



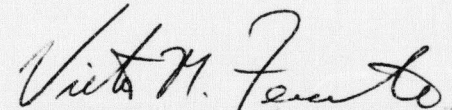
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CERTIFICATION

This is to certify that two (2) copies of the Brief and one (1) copy of the Appendix have been mailed to Thomas Belot, Assistant United States Attorney, United States Courthouse, Foley Square, New York, New York.



VICTOR M. FERRANTE
Attorney for Petitioners